Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	**WT Docket No. 08-165**
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	**COMMENTS OF THE CITY OF SAINT PAUL, MINNESOTA, AND THE CITY'S BOARD OF WATER COMMISSIONERS IN OPPOSITION TO CTIA'S PETITION FOR DECLARATORY RULING**

COMMENTS OF THE CITY OF SAINT PAUL, MINNESOTA AND THE CITY'S BOARD OF WATER COMMISSIONERS

These Comments are filed by the City of Saint Paul, MN (hereinafter, "Saint Paul") and the Board of Water Commissioners of the City of Saint Paul respectfully requesting the Commission to deny the Wireless Association (hereinafter, "CTIA") Petition for Declaratory Ruling dated July 11, 2008. For the reasons set forth in these Comments, it is Saint Paul's position that the CTIA Petition is without merit and without basis in law or fact. Saint Paul also joins in the Comments filed by the national Association of Telecommunications Officers and Advisors in response to CTIA's Petition.

I. CTIA'S SECTION 253 PREEMPTION ARGUMENT IS NOT APPLICABLE TO MUNCIPAL ZONING DECISIONS LIMITED TO APPLICATIONS FOR THE "PLACEMENT, CONSTRUCTION AND MODIFICATION" OF WIRELESS SERVICE FACILITIES IN LIGHT OF SECTION 332'S PRECISE LANGAUGE PRESERVING LOCAL ZONING AUTHORITY OVER SUCH ZONING APPLICATIONS.

It is Saint Paul's position that CTIA's arguments under 47 U.S.C. § 253(a) do not apply to wireless tower sitings because Section 253 is a general regulation pertaining to all telecommunications. The regulations found under 47 U.S.C. § 332(c)(7)(B), entitled "Preservation of local zoning authority," exclusively govern local zoning decisions regarding the "placement, construction, and modification of personal wireless service facilities" to the exclusion of Section 253. Section 332 addresses wireless service facilities specifically, whereas the language in Section 253 only addresses telecommunications generally. Congress does not enact redundant code provisions and the Supreme Court's ruling in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-385 (1992), establishes that specific code sections like Section 332 supersede general code sections such as Section 253.

47 U.S.C. § 332(c)(7)(B)(v) specifically provides that "Any person adversely affected by any final action or failure to act by a State of local government act or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." Section 332 is nothing less than a crystal clear statement of Congress' intent that jurisdiction over disputes relating to local zoning decisions regarding the placement, construction and modification of wireless service facilities shall be vested in a "court of competent jurisdiction," not the Commission. Indeed, 47 U.S.C. § 332(c)(7)(B)(v) clearly limits the Commission's jurisdiction over disputes relating to local zoning decisions regarding the placement, construction and modification of wireless service facilities to local zoning decisions made "on the basis of the environmental effects of radio frequency emissions." Then and only then may a "person adversely affected" petition the Commission for relief. Id.

The specificity of the remedies under Section 332 readily demonstrates the intent of Congress that Section 332's remedies are the exclusive remedies for wireless service facility zoning decisions to the exclusion of Section 253. Section 332's precise language informs local zoning authorities how they must treat wireless service facility applications. CTIA's claim that Section 253 provides the Commission with additional regulatory authority over local zoning decisions regarding wireless service facility applications in order "to eliminate barriers to deployment caused by zoning ordinances" is simply misplaced as it ignores the more specific enactments of Congress under Section 332. Accordingly, Saint Paul respectfully urges the Commission to disregard all of CTIA's Section 253 arguments.

II. CTIA'S CALL FOR COMMISSION RULE MAKING TO CLARIFY ALLEGEDLY UNCLEAR TERMS IN SECTION 332 IGNORES THE PLAIN STATEMENT OF CONGRESSIONAL INTENT IN SECTION 332(c)(7)(B) WHICH PLACES LIMITS OF LOCAL ZONING CONTROL OVER WIRELESS SERVICE FACILITY APPLICATIONS, ESTABLISHES JURISDICTION FOR VIOLATIONS OF SUCH LIMITS AND IS CONTRARY TO THE *GERGORY V. ASHCROFT* RULES OF ANALYSIS OF CONGRESSIONAL INTENT.

A. As applied to local zoning decisions, the limits placed by Congress on local zoning decisions under 47 U.S.C. § 332(c)(7)(B) do not require "clarification" or "interpretation" by the Commission.

It is Saint Paul's position that CTIA's legal arguments that Commission action is needed to "clarify relevant statutory terms" under of 47 U.S.C. § 332(c)(7)(B) is likewise misplaced and should be disregarded. CTIA contends that Commission action is needed regarding 47 U.S.C. § 332(c)(7)(B)(v) which provides in pertinent part that "any person adversely affected by a local government's final action or *failure to act* may, within 30 days, file suit in any court of competent jurisdiction." (Italics added). Saint Paul respectfully requests the Commission to note that the language under the subsection of Section 332 is very specific as to the procedures local zoning authorities must follow when considering wireless facility applications. Further, Section 332 imposes limitations on local zoning procedures and specifies remedies for any person adversely affected by a final action of the zoning authorities.

47 U.S.C. § 332(c)(7) provides:

> (A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State of local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
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> (B) Limitations.
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> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –
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> > (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
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> > (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
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> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
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> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
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> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental affects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
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> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Saint Paul respectfully urges the Commission to deny CTIA's request that the Commission supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to regulations that are ambiguous. Within the context of local zoning decisions, the phrase "Failure to act" is not ambiguous. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity.

CTIA's Petition to the Commission goes on to request the Commission to issue a "declaratory ruling" which would impose "reasonable time frames" upon local zoning authorities considering zoning requests pertaining to wireless facilities presumably because the phrase "failure to act," as enacted by Congress under 47 U.S.C. §§ 332(c)(7)(B)(v), is "ambiguous" and thus defeats the rapid deployment of wireless services in certain communities. CTIA also appears to suggest that the Commission can adopt "benchmarks based on input from CTIA's members" on CTIA's assertion that the Commission's authority to interpret 47 U.S.C. § 332(c)(7)(B)(ii), which in pertinent part states that a local zoning authority shall "act on any request for . . . wireless service facilities *within a reasonable period of time* after the request is duly filed . . ." (Italics added), is needed because Congress failed to say that a reasonable period of time in which to find a "failure to act" on the part of municipal zoning authorities is 45 days on "collocation" applications and 75 days on "all other" wireless facility citing applications.

B. Commission interpretation of Congressional intent based upon CTIA's misplaced reliance on rule of legal analysis under Chevron USA is unnecessary in the face of 47 U.S.C. § 332(c)(7)(B)'s plain language.

Contrary to CTIA's assertion, there is nothing vague or ambiguous about the statutory language enacted by Congress. CTIA argues that the Commission, "consistent with its judicial role," is entitled to issue a declaratory ruling that would supply meaning to "ambiguous phrases" through the imposition of arbitrary time lines selected by CTIA. CTIA would have the Commission mistakenly believe as a matter of law that the Commission, acting in a "judicial role" is entitled to render such declaratory rulings, largely on the strength of the recent decision Alliance for Community Media v. FCC, 529 F.3d 763 (6th Cir. 2008), where a three-judge panel from the Sixth Circuit affirmed a Commission order regarding video franchising. In Alliance, the Commission imposed mandatory timelines on video franchising deliberations in the absence of any Congressional authorization or requirement that the Commission possessed the authority to establish such timelines. The Alliance panel concluded that the Commission's timeline authority was entitled to judicial deference based upon Chevron USA v. National Resources Defense Council, 467 US 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Id., 529 F.3d at 776.

Saint Paul urges the Commission to strongly consider that the legal underpinning of Commission authority under Alliance warranting judicial deference to Commission decisions using a Chevron USA analysis is not applicable to the requests made in the CTIA Petition for two significant reasons: (1) the statutory language in 47 U.S.C. §§ 332(c)(7)(B)(v) is not ambiguous; and, (2) CTIA is urging the Commission, under the guise of "interpretation" and clearly contrary to the stated intent of Congress to preserve the siting of wireless service facilities under 47 U.S.C. § 332 (c)(7)(A) to local governments, to essentially engage in a legislative capacity regarding local

zoning control which is an area of law traditionally regulated by the governments of the States' and not the Federal government.

At the outset, Saint Paul does not dispute the Commission's rule making authority. However, it is Saint Paul's position that the terms in 47 U.S.C. § 332(c)(7), which CTIA now urges the Commission to "clarify" and "establish standards," would have the Commission exercising its rule making authority contrary to well settled principles of law. In matters where Congress has spoken in terms that are not ambiguous and where the language of the terms enacted by Congress touch upon matters that are traditionally regulated under the laws of the individual states, Saint Paul urges the Commission to consider that the better analysis for agency interpretation of Congressional enactments touching upon areas of law traditionally subject to state regulation is contained in Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) rather than the Chevron USA analysis - which the Alliance panel stated is "colloquially referred to as the 'Chevron two-step'" Id. 529 F.3d at 776.

It is Saint Paul's position that the "Chevron two-step" is best applied only to the review, analysis, and interpretation of laws enacted by Congress and administered federal agencies where the agencies bring special expertise to make determinations on matters that are of a complex and technical nature. Saint Paul respectfully submits that the Commission does not possess the requisite zoning expertise to tailor a new federal common law time limit standard to wireless facility zoning applications that would trump the local zoning and public property laws of all the State and local governments of the United States.

In Chevron USA, the Supreme Court dealt with the Environmental Protection Agency's (hereinafter, the "EPA") interpretation of an EPA regulation that was promulgated to implement certain national air quality standards enacted by Congress in the Clean Air Act Amendments of 1977. Justice Stevens, writing for a unanimous Court noted "The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue." Chevron USA, 467 U.S. at 848. The Court defined the focal point of the dispute as the meaning of the phrase "major stationary sources" set forth by Congress in the Clean Air Act Amendments. Id. at 849. The Court then embarked on a lengthy analysis of the EPA interpretation of the disputed phrase and concluded "Our review of the EPA's varying interpretations of the word 'source' – both before and after the 1977 Amendments – convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly – not in a sterile textual vacuum, but in the context of implementing policy decision in a technical and complex arena." Id at 863. Justice Stevens went on to say:

> "In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it

> simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests *which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency* charged with the administration of the statute in light of everyday realities."
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> Id. at 865 - 866. (Footnotes and citations omitted) (Italics added)

Saint Paul urges the Commission to consider the underlying context in which the Supreme Court in Chevron USA viewed an agency's interpretation of a law enacted by Congress: For whatever reason, Congress failed to supply a definition in a law that was of national importance and of a technical and complex nature. The definition ultimately promulgated by EPA was meant to supply meaning to the law involving this technical and complex subject matter. Further, as the Court repeatedly noted, that EPA was an agency possessing special expertise in the technical and complex matter of air pollution regulation. Thus, in the words of Justice Stevens, the Supreme Court, deferred to the agency only because Congress had "either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." Id.

Saint Paul contends that the rule of law articulated for the Chevron USA factual scenario could not be further from the scenario described in the CTIA Petition before the Commission. In Chevron USA, there was no specific indicator of Congressional intent in the legislation under consideration there. In sharp contrast, the language in 47 U.S.C. § 332(c)(7) contains an absolute, concise, and unequivocal statement of Congressional intent with respect to the regulatory treatment of mobile services: "Preservation of local zoning authority." Id. (Emphasis added). Without question, 47 U.S.C. § 332(c)(7) is a clear statement that Congress intended that local zoning authorities retain their traditional zoning powers over wireless facility siting subject only to the limitations expressly provided under 47 U.S.C. § 332(c)(7)(B). As the Supreme Court has stated in Chevron USA: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress." Id., 467 U.S. at 842-843. (Italics added). It is the respectful position of Saint Paul, in light of the plain statement by Congress to preserve local zoning control over the siting of wireless service facilities, that there is no legal basis upon which the Commission may consider the interpretations that CTIA urges in its Petition.

C. Where the intent of Congress is clear, as is the case under 47 U.S.C. § 332(c)(7)(B)'s preservation of local zoning control over wireless services siting, the Commission must exercise its interpretation of Congressional intent utilizing the Gregory v. Ashcroft analysis when dealing with laws, like local zoning controls, which are traditionally reserved to the States.

Should the Commission believe that it has the authority to interpret the so-called ambiguous provisions under 47 U.S.C. § 332(c)(7), Saint Paul urges the Commission to consider exercising this claimed authority based upon the Supreme Court's holding in Gregory v. Ashcroft, *supra.* In Gregory, the Supreme Court held that state judges are not protected by the Age Discrimination in Employment Act of 1967. The question before the Gregory Court was whether state judges who were subject to mandatory retirement fit within an exemption under the Age Discrimination Act covering state and local elected officials and policy makers. Id., 501 U.S. at 464-471. In its decision, the Gregory Court noted that "Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in the federalist system. It is a power that we must assume Congress did not exercise lightly." Id., at 460. The Court went on: "For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." Id., (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985). The Court in Gregory then stated:

> "If Congress intends to alter the 'usual constitutional balance between the State and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute' (Citation omitted). . . . Congress should make is intentions 'clear and manifest' if it intends to pre-empt the historic powers of the States. (Citation omitted)." Id., at 461.

There can be no dispute that zoning and land use regulations are areas traditionally regulated at a local level. And it is clearly the regulation of land use at the local level that CTIA urges the Commission to find fault with based upon the anecdotal examples set forth in CTIA's petition. It is equally well settled that land use is an area of law traditionally regulated by the States rather than by Congress and that the promulgation of land-use regulations is one of the historic powers of the States. As the Supreme Court has stated, "zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities." Warth v. Seldin, 422 U.S. 490, 508, n. 18, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). See also Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"); FERC v. Mississippi, 456 U.S. 742, 768, n. 30, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) ("Regulation of land use is perhaps the quintessential state activity"); Village of Belle Terre v. Boraas, 416 U.S. 1, 13, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974) (Marshall, J., Dissenting) ("I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government").

As noted above, Saint Paul respectfully submits that 47 U.S.C. § 332(c)(7) is not ambiguous. Congress clearly stated in Section 332 that zoning authority over wireless facility siting shall be preserved in the hands of local zoning authority. In light of the underlying case law and the clear statement of Congress, Saint Paul respectfully submits that the Commission lacks the legal

authority to undertake the rule making suggested by CTIA. If there are localized land use abuses as CTIA contends, the remedy for such abuses, if any, must come not from the Commission but from Congress in the form of amendments to Section 332 or by commencing legal action before a court of competent jurisdiction as already provided under Section 332.

In addition, it is Saint Paul's position that Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. 47 U.S.C. 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the Commission, for all the reasons noted above, would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended that all zoning decisions shall be determined at the local level.

III. LEGAL REQUIREMENTS FOR WIRELESS FACILITY SITING IN SAINT PAUL.

Saint Paul's zoning code permits wireless facilities and the associated equipment necessary to operate wireless facilities in all of Saint Paul's residential, traditional neighborhood, commercial, and industrial zoning districts, subject only to certain development standards. The standards for residential districts require a conditional use permit only when an antenna is placed on a residential structure that is less than sixty feet high or when an antenna is proposed on a new free-standing pole in a residential, traditional neighborhood or commercial district. Wireless facilities proposed under these circumstances represent the only instances where a wireless service provider must obtain a zoning approval. All other wireless applications meeting Saint Paul's wireless facility development standards need only apply for a building permit: no public hearing or zoning approval process is required.

Saint Paul's zoning regulation of wireless facilities predates the 1996 Telecommunications Act. Saint Paul began to regulate aspects of wireless facilities beginning in February of 1994. Following the 1996 Act, Saint Paul streamlined these regulations through a series of text amendments. The streamlined regulations were enacted in 1997 after the City actively sought the positions and recommendations from the wireless industry. The input from the wireless industry provided valuable and useful recommendations which resulted in a zoning and building permit process that Saint Paul believes is in the best interests of the general public as well the wireless industry. A copy of Saint Paul's zoning regulations pertaining to wireless services is attached to these Comments as Exhibit No. 1.

It is the position of Saint Paul that its wireless facility zoning regulations simply do not constitute the type of "substantial impediment to the provisions of wireless services" that CTIA states as its basis for requesting the Commission to issue a Declaratory Ruling regarding the plain language in 47 U.S.C. § 332(c)(7)(B). In the rare instance where Saint Paul's wireless service ordinance requires a conditional use permit for a wireless facility application, it is Minnesota's municipal zoning enabling act codified as the Minnesota Municipal Planning Act (Minn. Stat. § 462.351 et. seq.), not Saint Paul's municipal zoning ordinances - as CTIA's Petition would lead the Commission to believe – that requires all applications for a conditional use permit to go through

a public hearing. See, Minn. Stat. 462.3595, Subd. 2 attached to these Comments as Exhibit No. 2.

Furthermore, Minnesota' Municipal Planning Act specifically delegates to all Minnesota cities the authority to create a municipal board with the power to grant variances from municipal zoning regulations and to hear appeals from the decisions of municipal employees charged with administering municipal zoning regulations. Unlike the statutory requirement for a public hearing on all conditional use applications, Minnesota's Municipal Planning Act is silent regarding a mandate for public hearings for zoning variance applications. However, because municipal zoning regulations not only affect the use, enjoyment and value of a zoning variance applicant's property, a zoning applicant's variance request to use its land in a manner that is not permitted by law also affects the same property interests of nearby property owners. Thus, a public hearing on a zoning variance request affords all property owners affected by a zoning variance application with an opportunity to express their views on the zoning application. The public hearing process provides all affected property owners with due process.

The Supreme Court has ruled that in any legal proceeding, "The fundamental requisite of due process of law is the opportunity to be heard." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950) citing Grannis v. Ordean, 234 U.S. 385, 394 (1914). Thus, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford then an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . ." Hanover, Id., at 314 (citations omitted). Accordingly, Saint Paul, in order to fulfill this most basic principle of due process under Hanover, requires a public hearing with written notice all property owners within 350 feet of the property where the variance is requested.

Finally, Minnesota Law, since 1995 has required that all zoning applications must be decided in a timely fashion. Thus, every Minnesota city shall "approve or deny within 60 days of a written request relating to zoning . . . ." Minn. Stat. § 15.99, Subd. 2. The Commission can readily see that all cities in Minnesota must, in order to satisfy the legal requirements of due process as well as comply with the time line for making zoning decisions mandated by Minn. Stat. § 15.99, Subd. 2, must in a very short period of time, process, review, prepare a report and recommendation and conduct a public hearing before the proper government board on those wireless facility applications which require zoning approvals in a very short period of time. And, it is also well settled law in Minnesota, especially as it regard wireless facilities, that those cities that fail to act within the 60 day period mandated by Minn. Stat. § 15.99, Subd. 2 will find that the wireless application submitted to them has been "approved by operation of law." See, American Tower v. City of Grant, 636 N.W.2d 309 (Minn. 2001).

IV. ZONING AND BUILDING PERMITAPPLICATIONS TO THE CITY OF SAINT PAUL SITING APPLICATIONS TO THE CITY'S BOARD OF WATER COMMISSIONERS ARE HANDLED PROMPTLY IN COMPLIANCE WITH MINNESOTA LAW.

Since 2000, Saint Paul has received 59 building permit and zoning variance or zoning conditional use permit applications. Because Saint Paul's zoning code is written to allow wireless facilities in most of its zoning districts, most wireless facility applications only require a building permit. It is the rare wireless facility application that requires a variance or conditional use permit. Therefore, on average, Saint Paul accepts, reviews, and makes a final determination on wireless facility applications within 13 days of the date the application is first submitted. Given the 60 day decision requirement under Minn. Stat. § 15.99, Subd. 2. CTIA's portrait of zoning authorities refusing to act on wireless siting applications rings hollow. And, further research will reveal that a great many of the States have language in their zoning enabling acts that mandate a final determination on zoning applications within a specified period of time or risk what most local zoning agencies would consider the very draconian consequence of "deemed approved."

Applications for water tower sitings are similarly handled in accordance with all applicable laws. The Board of Water Commissioners of the City of Saint Paul ("Water Board") is a separate legal entity, authorized by Minnesota state law to, among other things, buy, sell and manage property in the city and surrounding region for the purpose of supplying safe, clean water to the population. Among its properties throughout the region are water towers which are comprised of land, structures and equipment and, due to their height, are attractive to wireless companies who want to provide coverage.

Wireless companies on occasion apply to the Water Board for placement of their equipment on and around the tower sites, as it saves them the cost of building a cellular tower. The Water Board does not require any variances or zoning applications for the placing of equipment (wireless or otherwise) on its water towers. Rather, as the owner of the property, it willingly permits placement of wireless facilities via a signed lease agreement. The Water Board has a template lease ready at all times for wireless companies to review and sign, and which will then be approved by the Water Board members at a monthly meeting. The lease requirements are tailored to ensure that the primary purpose of the structure – its function as a water tower – is maintained.

Records indicate the Board approved seven wireless leases on its structures between 2003 and 2008, and another is currently in negotiation. The time from agreement on a lease to approval by the Board is approximately 5 – 8 weeks. Lease negotiations can take more time, as the companies often need to report back to their superiors or legal staff on equipment plans or lease terms, but no requirement has ever prohibited or had the effect of prohibiting the placement of wireless equipment on any of Water's structures. The towers have a limited amount of space and care must be taken to avoid interference; companies sometimes change ownership; and the Board is legally mandated to ensure the safety of its water supply to over 400,000 people.

As was the case in the recent Ninth Circuit decision *Sprint Telephony PCS v. County of San Diego,* D.C. No. CV-03-1398 (September 11, 2008), the lease requirement to use Water Board property is a not a ban (in fact, it is permissive); it imposes no excessively long waiting periods; it permits a certain level of discretion to the Water Board; and thus permissibly balances the provision of wireless services with its valid legal obligations to supply safe water to the public. The lease preserves the fundamentals of property ownership and public goals of supplying safe water, and the Water Board has approved numerous wireless leases ever since the applications started coming in. Far from banning or impeding such, the Water Board has in fact facilitated and promoted the provision of wireless services by permitting the use of its property for these purposes.

V. CONCLUSION.

In conclusion, the Commission does not have the legal authority to issue the declaratory ruling requested by CTIA as it would be contrary to the clearly stated intentions of Congress. Further, the current process for addressing land use applications ensures that the property rights of all citizens are considered at a local level and that development is properly balanced within a local context. The system works well. There is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted to the Commission this 29th day of September, 2008

Ann Mulholland
Deputy Mayor
Saint Paul, Minnesota

65.300. PUBLIC SERVICES AND UTILITIES

Sec. 65.310. Antenna, cellular telephone.

A device consisting of metal, carbon fibre, or other electromagnetically conductive rods or elements, usually arranged in a circular array on a single supporting pole or other structure, and used for the transmission and reception of radio waves in wireless telephone communications.

Standards and conditions:

(a) In residential districts, a conditional use permit is required for cellular telephone antennas on a residential structure less than sixty (60) feet high. In residential, traditional neighborhood and business districts, a conditional use permit is required for cellular telephone antennas on a freestanding pole, except for existing utility poles. In residential and traditional neighborhood districts, existing utility poles to which cellular telephone antennas are attached shall be at least sixty (60) feet high.

(b) In residential, traditional neighborhood, and OS--B3 and B5 business districts, the antennas shall not extend more than fifteen (15) feet above the structural height of the structure to which they are attached. In B4 business and industrial districts, the antennas shall not extend more than forty (40) feet above the structural height of the structure to which they area attached.

(c) For antennas proposed to be located on a residential structure less thansixty (60) feet high in residential districts, or on a new freestanding pole in residential, traditional neighborhood, and business districts, the applicant shall demonstrate that the proposed antennas cannot be accommodated on an existing freestanding pole, an existing residential structure at least sixty (60) feet high, an existing institutional use structure, or a business building within one-half (1/2) mile radius of the proposed antennas due to one (1) or more of the following reasons:

(1) The planned equipment would exceed the structural capacity of the existing pole or structure.

(2) The planned equipment would cause interference with other existing or planned equipment on the pole or structure.

(3) The planned equipment cannot be accommodated at a height necessary to function reasonably.

(4) The owner of the existing pole, structure or building is unwilling to co-locate an antenna.

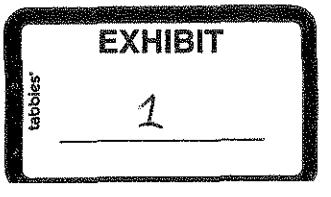
(d) In residential, traditional neighborhood and business districts, cellular telephone antennas to be located on a new freestanding pole are subject to the following standards and conditions:

(1) The freestanding pole shall not exceed seventy-five (75) feet in height, unless the applicant demonstrates that the surrounding topography, structures, or vegetation renders a seventy-five-foot pole impractical. Freestanding poles may exceed the above height limit by twenty-five (25) feet if the pole is designed to carry two (2) antennas.

(2) Antennas shall not be located in a required front or side yard and shall be set back one (1) times the height of the antenna plus ten (10) feet from the nearest residential structure.

(3) The antennas shall be designed where possible to blend into the surrounding environment through the use of color and camouflaging architectural treatment. Drawings or photographic perspectives showing the pole and antennas shall be provided to the planning commission to determine compliance with this provision.

(4) In residential and traditional neighborhood districts, the pole shall be on institutional use property at least one (1) acre in area. In business districts, the zoning lot on which the pole is located shall be within contiguous property with OS or less restrictive zoning at least one (1) acre in area.



(e) In industrial districts, cellular telephone antennas on a freestanding pole shall not exceed one hundred fifty (150) feet in height, shall not be located in a required front or side yard, and shall be set back one (1) times the height of the antenna plus ten (10) feet from the nearest residential structure.

(f) Antennas located in historic districts shall be subject to review and approval of the heritage preservation commission.

(g) Freestanding poles shall be a monopole design.

(h) Transmitting, receiving and switching equipment shall be housed within an existing structure whenever possible. If a new equipment building is necessary, it shall be permitted and regulated as an accessory building, section 63.500, and screened from view by landscaping where appropriate.

(i) Cellular telephone antennas that are no longer used for cellular telephone service shall be removed within one (1) year of nonuse.

CELLULAR ANTENNAS

Per 65.310

ZONING DISTRICT	ON EXISTING STRUCTURES	ON FREE STANDING POLE
Residential	Permitted on residential structures > 60' CUP on residential structure < 60' Not to extend > 15' above bldg	Permitted on existing utility poles > 60' CUP on new poles subject to: 1. Must be on an institutional use property at least (1) acre 2. Not to exceed 75' unless 2 antennas, then can be 25' higher 3. Not located in a required front or side yard & setback (1) times the height + 10' from nearest residential structure
Traditional	Permitted Not to extend > 15' above bldg	Permitted on existing utility poles < 60' CUP on new poles subject to: 1. Must be on an institutional use property at least (1) acre 2. Not to exceed 75' unless 2 antennas then can be 25' higher 3. Not located in a required front or side yard & setback (1) times the height + 10' from the nearest residential structure
OS and Business Districts	Permitted OS-B3 & B5: Not to extend >15' above the bldg B4: Not to extend > 40'above the bldg	Permitted on existing utility poles CUP on new poles subject to: 1. Located within contiguous property with OS or less restrictive zoning at least (1) acre 2. Not to exceed 75' unless 2 antennas, then can be 25' higher) 3. Not located in a required front or side yard & setback (1) times the height + 10' from the nearest residential structure
Industrial	Permitted Not to exceed > 40'above bldg	Permitted and not to exceed > 150' in height Not located in a required front or side yard & setback (1) times the height + 10' from the nearest residential structure
Historic	Requires a review of the plan and approval from HPC Staff	

Freestanding poles must be monopole design

Transmitting, receiving, switching equipment must be housed within an existing structure

2007 Minnesota Statutes

462.3595 CONDITIONAL USE PERMITS.

Subdivision 1. **Authority.** The governing body may by ordinance designate certain types of developments, including planned unit developments, and certain land development activities as conditional uses under zoning regulations. Conditional uses may be approved by the governing body or other designated authority by a showing by the applicant that the standards and criteria stated in the ordinance will be satisfied. The standards and criteria shall include both general requirements for all conditional uses, and insofar as practicable, requirements specific to each designated conditional use.

Subd. 2. **Public hearings.** Public hearings on the granting of conditional use permits shall be held in the manner provided in section 462.357, subdivision 3.

Subd. 3. **Duration.** A conditional use permit shall remain in effect as long as the conditions agreed upon are observed, but nothing in this section shall prevent the municipality from enacting or amending official controls to change the status of conditional uses.

Subd. 4. **Recording of permit.** A certified copy of any conditional use permit shall be recorded with the county recorder or registrar of titles of the county or counties in which the municipality is located for record. The conditional use permit shall include the legal description of the property included.

History: 1982 c 507 s 25; 2005 c 4 s 110